

No. 4104.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

G. W. BRAINARD, as Trustee in Bankruptcy
of the Pacific Co-Operative League
Stores, Inc., Bankrupt,

Appellant,

vs.

SAN DIEGO CO-OPERATIVE ASSOCIATION,

Appellee.

Brief of Appellee

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INTRODUCTION

On or about the fifteenth day of December, 1921, the San Diego Co-Operative Association met and discharged the Pacific Co-Operative League as its trustee, and appointed the board of directors of the San Diego Co-Operative Association as its trustees to conduct the property in controversy in this case, consisting of three grocery stores located in the City of San Diego, California. They also appointed and authorized a committee to ascertain the proper legal procedure for discharging the Pacific Co-Operative League as their trustee and to obtain an accounting from said trustee.

An action was commenced in the Superior Court of San Diego County for this purpose. A temporary restraining order was granted by said court restraining the Pacific Co-Operative League from taking any stock or monies from said stores and ordering all monies impounded in a local bank. This order was later made permanent pending the final determination of the matter before the Superior Court. This matter has never been brought to trial because of the bankruptcy proceedings.

Soon after the granting of the injunction, creditors of the Pacific Co-Operative League attached the San Diego stores. The San Diego Co-Operative Association filed a third party claim, and the creditors filed a \$40,000.00 bond.

The Pacific Co-Operative League was organized as a non-profit association under the laws of California. Sometime in 1921, creditors of the League discovered it to be in an insolvent condition. The creditors knowing that the Pacific Co-Operative League was acting as trustee for local associations and that many local stores in San Diego and elsewhere were not assets of the Pacific Co-Operative League, demanded that the Pacific Co-Operative League devise some plan for the protection of the creditors.

The Pacific Co-Operative League then organized a profit corporation under the laws of the State of California known as the Pacific Co-Operative League

Stores, Inc. All of the assets and liabilities of the Pacific Co-Operative League, an insolvent non-profit association without capital stock, were turned over to the Pacific Co-Operative League Stores, Inc., in exchange for five hundred shares of the common stock of the Pacific Co-Operative League Stores, Inc.

Ownership of the local stores in San Diego and elsewhere is evidenced by what is known as a "LOAN CAPITAL CERTIFICATE".

The Pacific Co-Operative League, Inc. obtained a permit from the State Corporation Department of the State of California allowing said corporation to issue its capital stock in exchange for Loan Capital Certificates and to sell a certain amount for cash.

The Pacific Co-Operative League Stores, Inc. employed a large number of high pressure salesmen who used gross misrepresentation to induce holders of Loan Capital Certificates to exchange said certificates for stock in the Pacific Co-Operative League Stores, Inc. A large number were exchanged because of the misrepresentation used by the salesmen.

Because complaints alleging misrepresentation were made to the State Corporation Commissioner of the State of California, the permit to sell and exchange the stock of the Pacific Co-Operative League, Inc. was ordered revoked on the 11th day of February, 1922, by said commissioner.

The creditors then filed involuntary petitions in bankruptcy against the Pacific Co-Operative League, and the Pacific Co-Operative League Stores, Inc. Both were adjudicated as bankrupts, Wm. H. Moore, Jr., being ancillary receiver in the Southern District of California, Southern Division, G. W. Brainard, trustee.

The receiver for the bankrupt estates of the above named bankrupts took possession of the three grocery stores located in the City of San Diego, California, belonging to the San Diego Co-Operative Association, a voluntary association of persons holding and owning Loan Capital Certificates evidencing ownership of said three stores, and organized for the purpose of operating and managing said stores.

These stores were operated by the Pacific Co-Operative League as trustee. They originally operated under the name of the Consumers' Grocery Company. Later the name was changed to Pacific Co-Operative League, San Diego Branch, the name used by the San Diego Co-Operative Association at that time.

The Pacific Co-Operative League, without the knowledge or consent of the San Diego Co-Operative Association for which it acted as trustee, transferred the three stores belonging to the San Diego Co-Operative Association to the Pacific Co-Operative League Stores, Inc.

After the receiver took possession of the stores in question, the San Diego Co-Operative Association representing the owners of Loan Capital Certificates filed a petition in reclamation. The matter was referred to Glen H. Munkelt, Esq., as special master, and hearings were had before him. The special master filed his report and later filed his supplemental report in which he recommended among other things that an order be made directing the receiver to deliver said stores to the San Diego Co-Operative Association as representative of the owners and holders of Loan Capital Certificates. The ancillary receiver filed exceptions to the report of the special master.

The report of the special master and the exceptions thereto were brought on for hearing before the Honorable Benjamin F. Bledsoe, judge of the United States District Court, in and for the Southern District of California, and on the 8th day of December, 1922, Judge Bledsoe filed a memorandum opinion which will be found on pages 148 to 154, inclusive of the transcript, and also made an order affirming the special master's report and assessing on the receiver a penalty of five dollars for each exception or one hundred fifty dollars.

Thereafter, on stipulation and order of court thereon the trustee, G. W. Brainard, was substituted in said cause for the ancillary receiver and the appeal is being prosecuted in the name of the trustee.

On May 21, 1923, the trustee filed his assignment of errors, which assignment of errors will be found on pages 155 to 157, inclusive, of the transcript.

STATEMENT

The local co-operative movement in San Diego grew out of the Federated Trades Council. This council appointed a committee in July, 1919, to investigate co-operation in general and report whether or not it would be advisable to form a local co-operative association to conduct a store or stores on the co-operative plan. The committee reported favorably. About this time there appeared in San Diego, a certain John A. Hadland. He assisted the committee then in existence in the formation of the present San Diego Co-Operative Association. The organization of the local association was completed about the 20th day of November, 1919. It was at that time called the San Diego Consumers' Co-Operative Association. (Testimony of Charles Henry Peltcher, Tr. p. 64; testimony of John A. Hadland, Tr. p. 66.)

On his way to San Diego from Alaska, Mr. Hadland had a conference with Mr. Ames, President of the Pacific Co-Operative League. Mr. Ames spoke of the possibility of Mr. Hadland doing co-operative work in San Diego and explained the Pacific Co-Operative League plan to him. Mr. Ames stated that the purpose of the Pacific Co-Operative League was to man-

age the stores of local associations, to train managers for this purpose, to give advice to organizations opening new stores, to promote the idea of co-operation, and to publish an organ spreading the work of co-operation, that the San Diego stores should be financed on a \$50.00 basis, \$10.00 for an associate membership fee in the Pacific Co-Operative League for services rendered to the local association by the league, \$40.00 was to be for goods on the shelves of the store or in other words, the property of the San Diego people. That in addition the members of the local association could vote 25 per cent of its capital for a wholesale, known as the Co-Operative Wholesale Company of San Francisco, a separate organization.

Mr. Hadland repeated the statements made by Mr. Ames on the league plan to prospective members at public meetings and personally. He also distributed about fifty copies of the By-Laws of the Pacific Co-Operative League given to him by Mr. Ames in Seattle. Later, Mr. Hadland distributed additional By-Laws of the Pacific Co-Operative League and other pamphlets explaining the League plan sent to him by Mr. Ames after his arrival in San Diego. (Testimony of John A. Hadland, Tr. pp. 66-68).

Mr. Hadland then circulated the following subscription list:

“This list is in charge of No. 12.

“SAN DIEGO CONSUMERS CO-OPERATIVE
ASSOCIATION.

Labor Temple, 621 Sixth Street.

“San Diego, California, Jan. 26th, 1920.

(Testimony of John A. Hadland.)

“We, the undersigned, hereby agree to subscribe for membership in the San Diego Branch Co-Operative store, and agree to pay thereon the sum of \$50.00 (fifty dollars) in cash or installments on receiving notice of collection from Mr. Johnson our BONDED ORGANIZER.”

(Tr. pp. 67-68.)

Mr. Hadland left San Diego about June 1, 1920, for Alaska in the employ of the Pacific Co-Operative League, where he was ordered by Mr. Ames and was sent a check for \$50.00 to pay his expenses to San Francisco where he reported to Mr. Ames. (Testimony of John A. Hadland, Tr. p. 70.)

After the preliminary work of Mr. Hadland, Mr. Ames, the President of the Pacific Co-Operative League and Mr. A. A. Johnson, the bonded organizer of the League, came to San Diego. They addressed various meetings explaining the league plan and the benefits to be derived by the local people through affiliation with the League. In addition to the representations made at these meetings, Mr. A. A. Johnson interviewed a large number of the local people personally and through his representations induced them to

subscribe loan capital to the local stores and to pay \$10.00 for an associate membership in the League.

Mr. Ames and Mr. Johnson both stated that under the League plan, the members of the local association would run the stores purchased with their money; that the league would act as trustees or agents, manage the stores, keep the books, furnish expert managers, promote the co-operative movement, furnish expert advice in the purchase of stores; that affiliated associations could purchase through the Co-Operative Wholesale thereby combining the buying power of a large number of stores and purchase cheaper than otherwise; that the league would keep an accurate check on the stock and prevent overstocking on the purchase of unsalable goods; that the Pacific Co-Operative League operated on the "Rochdale Plan". (Testimony of Charles J. Eason, Tr. pp. 71-74; testimony of W. S. Neal, Tr. pp. 87-89; testimony of Stanley M. Gue, Tr. pp. 88-91; testimony of Mrs. Bertha Gleason, Tr. p. 92; testimony of J. R. Dennison, Tr. pp. 143-145.)

In addition to these representations made by Mr. Ames, President of the Pacific Co-Operative League, Mr. Johnson and Mr. Hadland at public meetings and by personal interviews, pamphlets, By-Laws, copies of the Pacific Co-Operator, and other literature explaining the Pacific Co-Operative League plan were distributed among the San Diego people interested in co-operation.

“Page 2—By-Laws Pacific Co-Operative League:

“Second, the purpose for which this Association is formed is to promote the theory of co-operation and to advance its practical development, to establish a central bureau of information, education, publicity and general service, and to provide literature and lectures; to assist co-operative movement; to act as organizer, promoters, advisers and auditors for Co-Operative Associations, and to assist dependent co-operative enterprises to work in unity with one another and to develop a federation of co-operative bodies for mutual advantage.”

(Tr. p.70.)

Petitioners' Exhibit No. 14—Pacific Co-Operator March, 1921, Article by Mr. Ames: “The Pacific Co-Operative League adheres to all the fundamental principles of the Rochdale system, briefly the plan of operation of the Pacific Co-Operative League is as follows: In a local group, desirous of organizing a store it consults the home office of the Pacific Co-Operative League in San Francisco as to the minimum membership and capital required. Having been advised it usually obtains the assistance of a trained, salaried instructor to address meetings which assist local committees to secure the members and to raise the capital. *The funds are deposited in trust with the Pacific Co-Operative League and members credited.* In addition to the capital subscribed, members are required to pay a \$10.00 Association membership fee. This fee is

used by the home office to pay the incidental organization expenses, subscription to the official monthly organ, the Pacific Co-Operator, and to help defray expenses of general education work, of dues to the International Co-Operative Alliance, etc., a federated plan of the League as distinguished by modified form of federation. Local groups are autonomous, in that the responsibility for success or failure rests squarely on them. They are not autonomous in that they are not independent of other groups but are obliged to work in unity with the plans outlined by the combined groups of the Association. On the same principle, that the State of New Jersey is not autonomous political and geographical entity but an integral working part of an association of states, so a branch of the Pacific Co-Operative League is a unit in the federation of co-operative societies combined for mutual protection and progress. (Tr. pp. 98-100.)

Petitioners Exhibit No. 12, the Pacific Co-Operator, December, 1920, on front cover page: "The general work of the League consists of educating co-operators when they desire organizing into stores, groups and industries, and federating them for the development of better mutual service between producer and consumer, and the other accomplishment of the International Co-Operative Commonwealth. Experienced and capable advice offered to those wishing to organize for such purpose. Secure the best advice possible for starting a new Co-Operative organization."

"Pacific Co-Operator, July, 1920, Page 100: *"It is the general plan to deposit the funds collected for store establishment in a local bank to be held in trust by the League for the purpose for which it is subscribed."*

Pacific Co-Operator, December, 1920, Page 192-193: "San Diego at the advice of the League spent a long time in preparing for its business career. Some may have been a little impatient with the delay but that is now forgotten and it is a long career ahead. The Board of Directors headed by President Bischoff is displaying the special business ability in the administration of its affairs with frequent meetings of the Board, prompt attention to business by Committees, its ample material with which to meet the members at their monthly meetings." (Tr. pp. 99-101.)

Following these representations, money was collected and turned over to organizer A. A. Johnson, one of the representations of the Pacific Co-Operative League being that it would take care of the funds until they would be used to purchase a store or stores in San Diego. (Testimony of Charles J. Eason, Tr. p. 72.)

The subscribers to loan capital received a certificate called a "LOAN CAPITAL CERTIFICATE," which was in the following form:

"CO-OPERATION.

"Producer

Consumer

The link that binds

“PACIFIC CO-OPERATIVE LEAGUE, Inc.

“San Francisco, Calif.

“Incorporated October 13, 1913. Not operated for profit.

“*Certificate of Loan Capital.*

“(without liability)

“Received of George F. Gray.

“(The holder hereby agrees that this Certificate is liable to forfeiture in the event the holder becomes indebted to the Pacific Co-Operative League)

“The sum of Forty & 99-100 Dollars \$40.00, as Loan Capital : This loan capital is to be invested in the Pacific Co-Operative League for the use of the Co-Operative Store at San Diego, Calif. in accordance with the By-Laws of the Pacific Co-Operative League.

“PACIFIC CO-OPERATIVE LEAGUE,

“Ernest O. F. Ames, President.

“Attest: W. S. Huntington, Registrar.

“Dated, San Francisco, Cal. Aug. 30, 1920.”

(Petitioner's Exhibit 9. Tr. p. 68.)

A committee was then appointed by the San Diego Co-Operative Association to investigate the purchase of stores. The committee considered a proposition submitted by Mr. Hammond for the purchase of the stores of the Consumers Grocery Company. They also asked that Mr. Floaten, an expert employed by the Pacific Co-Operative League, be sent to San Diego to give his advice on the purchase as that was one of the services offered by the League. Mr. Floaten reported favorably and the local Association made a further effort to

get sufficient funds to purchase the stores. (Testimony of Charles J. Eason, Tr. pp. 77-79.)

The following is from the minutes of the Directors' meeting of the San Diego Co-Operative League now known as the San Diego Co-Operative Association, of August 9th, 1920:

"Organizer Johnson stated: That Mr. Hammond, the proprietor of the Consumers' Grocery Company's stores, requested that we give him a definite answer in regard to our intention of purchasing the stores. Mr. Johnson also reported: That up to the present time only \$13,000.00 of the loan capital had been paid in, this amount includes the \$2,000 special loan of the Carpenters' Union. In view of this fact, it will be necessary for the Consumers' Grocery Company to reduce their stock to \$14,000 before we could purchase it.

"Moved by Director Rogers, seconded by Director Barnes that the entire Board of Directors act as a Committee to make the necessary arrangements for the purchase of the three stores of the Consumers' Grocery Company and that the acts of the majority of the Committee be binding. Motion carried.

"The President stated that unless objection was made, the consent of the Board of Directors, hereby granted, authorizing the President and Secretary to draw on the Pacific Co-Operative League for \$1,000.00

in favor of the Consumers' Grocery Company, this payment being necessary to the binding of the purchase agreement for the three stores this payment not to be made unless the purchase terms are satisfactory to the Committee. There being no objection it was agreed to.

"Moved by Director Webster, seconded by Director Barnes; that notice be sent to the Pacific Co-Operative League of the purchase of the stores and that they be requested to send a League representative here to superintend their opening. Motion carried." (Tr. pp. 78-80.)

The San Diego Co-Operative Association then entered into an agreement with the Consumers' Grocery Company to purchase the certain grocery stores mentioned in this proceeding. Said agreement was in the following form:

"CONTRACT AND AGREEMENT.

August 11, 1920.

"1. THIS CONTRACT AND AGREEMENT entered into this date between the Consumers' Grocery Company, Inc., hereinafter known as the party of the first part, and the San Diego Co-Operative Association, party of the second part, Witness:

"2. In receipt of \$1,000.00 (One Thousand Dollars) the party of the first part gives the party of the second part an option to purchase the stock and fixtures located at 426 Market Street, 618 Firth Street and the S. W. Corner of Broadway and Eleventh St.

"3. It is understood and agreed by both parties that this option expires in thirty (30) days from this date (August 11, 1920).

"4. The party of the first part agrees to sell to the party of the second part the stock of merchandise located in the three stores enumerated in paragraph 2 at the present market price per pound, per dozen, per case or per gallon, at the wholesale jobbers price list of the City of San Diego.

"5. Both parties agree to name the following committee of three men, who are in the wholesale grocery business, to price this inventory:

"H. A. Floaten, or other representative of the Pacific Co-Operative League.

"Charles P. Morse, of Klauber-Wangenheim Company.

"H. G. Brohm, of Klauber-Wangenheim Company.

"6. Both parties agree to the price that this Committee places on the merchandise as per agreement in paragraph 4.

"7. The expense of the work done by this Committee to be divided equally between both parties.

"8. All insurance, public liens, telephone, electric light, gas, rent and or any other prepaid item to be pro rated to the date of the consummation of the purchase.

"9. All returnable containers to be taken up in the stock inventory at their cash value, such as barrels,

bottles, jugs, cans and or any other items of such nature.

"10. Paper bags, paper, wrapping twine, register tape and or any other material necessary to the operation of the grocery business to be taken up in the stock inventory at the present market price per pound, as per the wholesale price lists.

"11. The party of the first part hereby acknowledges to the party of the second part receipt of \$1,000.00 (One Thousand Dollars), being payment for the option covered in paragraph 4.

"12. At the time this sale is consummated, provided it is consummated within the time limit, it is understood by both parties that the One Thousand Dollars paid in by the party of the second part shall constitute the first payment.

"13. It is understood and agreed by both parties that upon payment of an additional \$12,000.00 (Twelve Thousand Dollars," if there should be any, that the party of the first part, making a total paid in of \$13,000.00 (Thirteen Thousand Dollars), the business of the three stores as enumerated in paragraph 2, will be turned over to the party of the second part.

"14. It is further understood and agreed that the unpaid balance over a total of \$13,000.00 (Thirteen Thousand Dollars, if there should be any, that the party of the second part will turn over to the party of the first part the total daily cash sales each day un-

til the balance is paid in full; in no event shall the purchase price exceed the sum of \$15,000.00 (Fifteen Thousand Dollars).

"15. In the event that the stock and fixtures should inventory less than the amount paid in, namely, \$13,000.00 (Thirteen Thousand Dollars), by party of the second part, the party of the first part will give to the party of the second part a check covering the difference.

"16. It is understood and agreed that the fixtures of the three stores enumerated in paragraph 2 shall be included in the inventory at \$5,000.00 (Five Thousand Dollars), the fixtures to be those as shown on the list attached to this agreement.

"Consumers Grocery Company, Inc.,

"By Justin W. Hammond.

".....

"Justin W. Hammond, President.

"San Diego Co-Operative Association,

"By J. N. F. Bishoff, President.

"Chas. J. Eason, Secretary.

"San Francisco, Cal.

"The above Agreement approved this date.

"Pacific Co-Operative League,

"By....." (Tr. pp. 73-77.)

The President and Secretary of the San Diego Association were duly authorized to draw on the Pacific Co-Operative League for \$1,000.00 in favor of the

Consumers Grocery Company to bind the agreement to purchase. Notice was sent to the Pacific Co-Operative League of the purchase of the stores and they were requested to send a League representative to superintend their opening. (Minutes of the Directors' Meeting of the San Diego Co-Operative League, August 9, 1920, Tr. pp. 79.)

All of the money used in the purchase of the stores was furnished by the San Diego Association. At the date of the purchase of the stores, \$15,393.00 in cash was paid on subscriptions: \$2,000.00 borrowed by the local Association on a note from Templeton Johnson; \$17,393.00 total cash to credit of local Association; inventory showing a total value of \$21,616.38; \$5,476.36 taken from cash receipts from operation of stores; actual purchase price paid in drafts on Pacific Co-Operative League \$16,140.02; leaving a balance of \$1,252.98 surplus to the credit of the local Association after the stores were purchased. (Stipulation of Facts, Tr. p. 147.)

The notice of sale and the bill of sale were executed in the name of the Pacific Co-Operative League without the knowledge of the San Diego Association. (Testimony of H. A. Floaten, Tr. p. 135; testimony of Charles J. Eason, Tr. p. 80.)

Complying with the request of the San Diego Association, the League sent Mr. H. A. Floaten, a store supervisor, to San Diego to get the stores started.

To increase the membership in the San Diego Association and the capital in the stores, Mr. A. A. Johnson, a representative of the Pacific Co-Operative League, and with the knowledge of Mr. H. A. Floaten, the following sign was ordered by Mr. Johnson and placed upon the largest store, located on Broadway, one of the principle thoroughfares in San Diego, remaining there for more than one year and still there at the time this proceeding was begun:

PETITIONERS' EXHIBIT No. 6
"TO REDUCE THE COST OF LIVING
"THIS STORE OWNED AND OPERATED BY
"500 FAMILIES.

"Ask the Clerk how you can join them."

(Testimony of Walter Huggins, Tr. p. 96; testimony of H. A. Floaten, Tr. p. 134.)

After the purchase of the stores, the manager made regular reports to the local board of directors on the condition of the business, finances, etc. Several inventories were taken by the local board of directors. All correspondence from the League concerning the stores was addressed to the San Diego Association or one of its officers. Bills were authorized to be paid by the local board. The Pacific Co-Operative League recognized the members of the local Association as an entity and not as a number of individuals that loaned money to the League. (Minutes of the Directors' meeting of the San Diego Co-Operative League, Aug-

ust 9, 1920, Tr. pp. 78-80; tr. pp. 85-87; testimony of Stanley M. Gue, 'Tr. p. 91; testimony of Walter Huggins, 'Tr. pp. 94-96; Petitioners' Exhibit No. 21, 'Tr. pp. 100-103; Minutes of meeting of Board of Directors, San Diego Association, December 2, 1920, Tr. p. 103; testimony of J. N. Bischoff, Tr. pp. 115-117; testimony of John S. Seibert, Tr. pp. 123-126.)

The Board of Directors of the San Diego Association computed the amount to be paid the members as rebates on profits on their stores according to their purchases, after first deducting 5 per cent interest due on Loan Capital. They then sent these amounts to the Pacific Co-Operative League for payment. The Board decided on the amount to be distributed. The San Diego people did not share in any of the profits of other local groups or in the profits of the Pacific Co-Operative League, neither were the bills of the San Diego stores or the interest due on Loan Capital paid from any other source than the earnings of the local stores in San Diego. The following is a copy of the form used in paying interest on loan Capital Certificates and rebates to members of the local Association:

“Pacific Co-Operative League

“(Signed) Ernest Ames

“San Diego Branch

“When Redeemed Manager Must Forward with Daily
“Report.

The reverse side of Exhibit reads as follows:

“(1) Added Capital

"Please place to credit of loan capital in my name.

"Name

"(2) Redeemed in Cash.

"Name (Signed) Stanley M. Gue.

"(3) Redeemed in Mdse.

"Name

The second sheet of aforesaid exhibit is in words and figures as follows, to-wit:

"No. 58 To Be Cashed at Store only.

"Pacific Co-Operative League,

"San Francisco, Dec. 31, 1920.

"To the Manager of San Diego Branch:

"Pay to, or Credit W. B. Jones - - - - \$17

" _____ Seventeen Cents _____ Dollars.

"being in full payment of dividend and interest to December 31st.

" 1. This can be added to members' share .

" 2. It can be taken out in trade by member, or .

" 3. It can be exchanged for cash. .

" Member will strike out the line not wanted and .

" sign here in full settlement. .

"

"

"Pacific Co-Operative League

"(Signed) Ernest Ames

"San Diego Branch

"When Redeemed Manager Must Forward with Daily Report.

"(over)"

The reverse side of Exhibit reads as follows:

“(1) Added Capital

“Please place to credit of loan capital in my name.

“Name

“(2) Redeemed in Cash

“Name

“(3) Redeemed in Mdse

“Name

Petitioners' Exhibit No. 16

(Testimony of Charles J. Eason, Tr. pp. 80, 83; minutes of the members' meeting of the San Diego Association, dated Feb. 17, 1921, Tr. pp. 80, 81; testimony of Stanley M. Gue, Tr. pp. 90-91; testimony of Charles J. Mays, Tr. pp. 92, 93; testimony of A. A. Johnson, Tr. p. 110; testimony of John S. Seibert, Tr. p. 125; testimony H. H. Dobbs, Tr. p. 142.)

The By-Laws of the Pacific Co-Operative League provide that upon the dissolution of any store or stores belonging to a local Association, the monies received for same are to be pro-rated among the holders of Loan Capital Certificates in said group or Association and the manner in which local associations and stores are organized. (Tr. p. 102.)

By-Laws. “Article 9, Section 3, Operation of branches. In order to permit the operation of branch stores by association members as provided in Article 2, Section 2, it is hereby provided that the Board of Di-

rectors may, upon request from a group of associate members, order a survey of any district selected for a branch store, to be made, decide the number of members and the capital required to operate such branch.” (Tr. p. 102.)

By-Laws Pacific Co-Operative League, Section 4, Article 9:

“Each local branch upon being admitted into the Pacific Co-Operative League shall transfer to the League the funds collected as loan capital for the establishment of its store, for which there shall be immediately issued membership Loan Capital Certificates. The central Board of Directors of the Pacific Co-Operative League which then proceeds to institute the store and shall provide equipment and stock for the same with the funds as above provided, etc.” (Tr. p. 135.)

The merchandise for the San Diego stores was purchased almost entirely in San Diego from local wholesalers, a small portion in Los Angeles. The only creditors of the San Diego stores are local wholesalers who believed that said stores were owned by the San Diego people at the time they extended credit, and who did not file claims against the bankrupt estate. (Testimony of Walter Huggins, Tr. pp. 94, 95; testimony of Walter G. Gastil, Tr. p. 97.)

The name of the local Association in San Diego was changed at various times but the Association re-

mained the same. First, it was known as the San Diego Consumers' Co-Operative Association, then the San Diego Co-Operative League, then the San Diego Branch of the Pacific Co-Operative League and later to the San Deigo Co-Operative Association. (Testimony of Charles J. Eason, Tr. p. 73.)

From the 11th day of September, 1920, until sometime in November the name of the Consumers' Grocery Company on the stores was not changed. Because of the fact that members of the local Association were confused and purchased at another store nearby through mistake, Manager Floaten recommended to the local association that they place large signs on the stores carrying the name of the San Diego Association which was at that time known as the San Diego Branch of the Pacific Co-Operative League. On November 12, 1920, the Board of Directors of the San Diego Association passed a resolution that signs should be placed on the stores to read "San Diego Branch, Pacific Co-Operative League, Store No. 1, Store No. 2, and Store No. 3 respectively. (Tr. p. 85.)

Daily cash receipts from the stores were sent to the Pacific Co-Operative League in San Francisco as Trustee. The bills of the San Diego stores were paid by the league out of the monies belonging to the San Diego Association. The bills were paid for a while, then notwithstanding the fact that there was more than sufficient money to the credit of the San Diego stores

held by the League, the bills were not paid. The San Diego creditors began to press the local Association for their money. Believing that the Pacific Co-Operative League had violated its trust, the San Diego Association discharged the Pacific Co-Operative League as its Trustee and demanded an accounting. A Legal Committee was appointed to take necessary action toward this end. The League was notified of its discharge and demand made for the stores. This was refused. An action asking for an accounting and a dissolution of the trust relationship was then commenced in the Superior Court of the County of San Diego, State of California. An injunction was granted by said Court against the Pacific Co-Operative League, prohibiting the League from removing any stock or monies except in the usual course of business and ordering all monies impounded in a local bank in San Diego, pending the trial of the case. (Minutes of meeting of San Diego Association, Dec. 15, 1921, Tr. p. 91; testimony of Walter Huggins, Tr. p. 94.)

The Pacific Co-Operative League was a non-profit association incorporated as such, without capital stock under the laws of the State of California. Its capital consisted of money obtained through membership payments. (Petitioners' Exhibit No. 31, Tr. p. 102).

The creditors of the Pacific Co-Operative League discovered that the League was under financial difficulties and demanded protection. They did not believe that they were adequately safeguarded under the form of or-

ganization of the League as its total assets consisted of money obtained through membership payments by associate members. (Petitioners' Exhibit No. 21, Tr. p. 102; By-Laws of the Pacific Co-Operative League, Tr. pp. 70, 102.)

A profit corporation was then organized under the laws of the State of California, known as the Pacific Co-Operative League Stores, Inc. The plan of the Pacific Co-Operative League was to obtain the ownership and control of the stores in San Diego and elsewhere by exchanging the capital stock of the new corporation for "Loan Capital Certificates".

A permit was obtained from the State Corporation Department of California allowing the new corporation to exchange its stock for Loan Capital Certificates, and to sell a certain amount in addition for cash.

A number of high pressure stock salesmen were employed for this purpose. To induce holders of Loan Capital to exchange their certificates for stock, all sorts of misrepresentations were used. Because of said misrepresentations, the State Corporation Commissioner revoked the permit of the Pacific Co-Operative League Stores, Inc. on the 11th day of February, 1922. (Tr. p. 43.)

On or about the 1st day of November, 1921, the Pacific Co-Operative League attempted to sell to the Pacific Co-Operative League Stores, Inc., the San Diego stores without the knowledge or consent of the

San Diego Association or the holders of Loan Capital in San Diego.

The creditors then filed involuntary petitions in bankruptcy against the Pacific Co-Operative League, and the Pacific Co-Operative League Stores, Inc.

BRIEF OF ARGUMENT

Counsel for the appellant appears to be taking this appeal on the ground that there is insufficient evidence to support the conclusions of the Special Master and the District Court.

This is a proceeding in equity. We contend that we have an equitable title to the stores in question; that the Pacific Co-Operative League was employed by and acted as Trustee for the San Diego Co-Operative Association for the purpose of operating and managing the three grocery stores in San Diego for the benefit of the members of the San Diego Association.

Organization of San Diego Association

The local Association in San Diego was originally known as the San Diego Consumers Co-Operative Association. The original organization was perfected about the 20th day of November, 1919. (Testimony of John A. Hadland, Tr. p. 66.)

Later the name of the organization was changed to the San Diego Co-Operative League, San Diego Branch of the Pacific Co-Operative League and then

to the present name San Diego Co-Operative Association. (Testimony of Chas. J. Eason, Tr. p. 73.)

It is a voluntary association of the holders of "Loan Capital Certificates". It was organized by them so as to have a central body to protect their interests, represent them in the selection and purchase of a store or stores, the employment of proper management, to carry out their wishes in the conduct and policies of stores purchased by them.

'They held regular meetings, elected officers and a Board of Directors to represent them, appointed a committee to investigate the purchase of stores, authorized said committee to purchase what they deemed best, an agreement was signed by the President and Secretary of the Association as such, for the purchase of stores, heard reports on the financial condition of the stores by the manager, took inventory, determined the amount of profit of the stores, determined the amount of said profits to be set aside for depreciation, interest, surplus, education, and after said deductions, to be paid back to the members in the form of rebates on their purchases and did other things necessary to the proper conduct of the business. They were recognized by the Pacific Co-Operative League as an entity through correspondence addressed to the San Diego Association and the officers of said Association as such. Mr. Ames President of the League and other representatives addressed meetings of the local Association. The League

recognized and paid drafts drawn on the League, for the purchase of the stores, by the San Diego Association. They sent League experts to advise in the purchase, and opening of the stores at the request of the local Association. They requested permission of the San Diego Association to allow them to use some of the funds belonging to said Association to pay the expenses of Mr. Ames, President of the Pacific Co-Operative League incurred by his trip to Cleveland in the interest of co-operation. They recognized the San Diego Association in the official organ of the League, known as the Pacific Co-Operator, and in other transactions natural to the conduct of the stores in San Diego. Counsel for the appellant contend that there is no entity but that all transactions with reference to the stores in question were between the Pacific Co-Operative League and a number of individuals in San Diego; that the League never had any dealings with the San Diego Co-Operative Association and that they cannot understand how either the Special Master or the District Court arrived at the conclusion that the stores were the property of the holders of Loan Capital Certificates and should be returned to the San Diego Co-Operative Association as their representatives. (First subscription list, Tr. p. 67; testimony of Charles J. Eason, Tr. pp. 71-74, 76-82, 83; Minutes of meeting of San Diego Association, September 16, October 14, November 12, December 16, 1920, Tr. p. 85; testimony of Stanley M. Gue, Tr. p. 88, 90, 91; testimony of Walter Huggins, Tr. pp. 94-96; Pacific Co-Operator,

December, 1920, p. 192-193, 'Tr. pp. 99, 100; Pacific Co-Operator, February, 1920, Tr. p. 100; Petitioners' Exhibit No. 25, Tr. p. 100; Petitioners' Exhibit No. 21, several letters to local Association, Tr. pp. 100-103; Minutes of meeting of Directors San Diego Association, December 2, 1920; Tr. p. 103; testimony of Monott Romaine, Tr. p. 104; testimony of J. N. Bischoff, Tr. 115; Tr. p. 147.)

Representations

The San Diego people were induced to affiliate with the Pacific Co-Operative League through the representations made by Mr. Ames, Mr. Johnson and other representatives of the League made in personal interviews and at meetings of the San Diego Association. Also through articles published in the Pacific Co-Operator, By-Laws of the League distributed in San Diego and other literature, and by reason of a sign placed on the largest store by Mr. Johnson with the knowledge of Mr. H. A. Floaten, another League representative. (Testimony of Charles H. Peltcher, Tr. pp. 64-66; testimony of John A. Hadland, Tr. pp. 66-68; testimony of Charles J. Eason, Tr. pp. 71-74; testimony of W. S. Neal, Tr. p. 87; testimony of Stanley M. Gue, Tr. 88-91.) The plan of operation of the Pacific Co-Operative League as represented was:

League Plan

"Page 2—By-Laws Co-Operative League:

“Second, the purpose for which this Association is formed is to promote the theory of co-operation and to advance its practical development, to establish a central bureau of information, education, publicity and general service, and to provide literature and lectures; to assist co-operative movement; to act as organizer, promoters, advisers and auditors for Co-Operative Association, and to assist dependent co-operative enterprises to work in unity with one another and to develop a federation of co-operative bodies for mutual advantage.” (Tr. p. 70.)

Petitioners' Exhibit No. 14—Pacific Co-Operator, March 1921, Article by Mr. Ames:

“The Pacific Co-Operative League adheres to all the fundamental principles of the Rochdale system, briefly the plan of operation of the Pacific Co-Operative League is as follows: In a local group, desirous of organizing a store it consults the home office of the Pacific Co-Operative League in San Francisco as to the minimum membership and capital required. Having been advised it usually obtains the assistance of a trained, salaried instructor to address meetings which assist local committees to secure the members and to raise the capital. The funds are deposited in trust with the Pacific Co-Operative League and members credited. In addition to the capital subscribed, members are required to pay a \$10.00 Association membership fee. This fee is used by the home office to pay the incidental organization expenses, subscription to the

official monthly organ, the Pacific Co-Operator, and to help defray expenses of general education work, of dues to the International Co-Operative Alliance, etc., a federated plan of the League as distinguished by modified form of federation. Local groups are autonomous—in that they are not independent of other groups but are obliged to work in unity with the plans outlined by the combined groups of the Association. On the same principle, that the State of New Jersey is not autonomus political and geographical entity but an integral working part of an association of states, so a branch of the Pacific Co-Operative League is a unit in the federation of co-operative societies combined for mutual protection and progress.” (Tr. pp. 98, 99.)

Pacific Co-Operator, July 1920, page 100: “It is the general plan to deposit the funds collected for store establishment in a local bank to be held in trust by the League for the purpose for which it is subscribed.” (Tr. p. 99.)

The following sign was placed on the largest store to attract new members by Mr. A. A. Johnson with the knowledge of Mr. H. A. Floaten. It was on the store for more than two years:

Petitioners’ Exhibit No. 6:

“TO REDUCE THE COST OF LIVING
“THIS STORE OWNED AND OPERATED BY
“500 FAMILIES.

“Ask the Clerk how you can join them.”

(Testimony of Walter Huggins, Tr. p. 96; testimony of H. A. Floaten, Tr. p. 136.)

The League plan as represented by Mr. Ames, Mr. Johnson and others at meetings and through personal contact was: that the Pacific Co-Operative League operated under the "Rochdale System"; that by affiliating with the League the local Association would be affiliating with many other similar associations; that by so doing they could combine their buying power and purchase merchandise through a co-operative wholesale operated by but not a part of the Pacific Co-Operative League in San Francisco and purchase cheaper than through local wholesalers; that the League had a special system of accounting and would keep an accurate account of the stores' business, an accurate account of the stores' stock, and see that the stores did not overbuy, or become stocked up with unsalable merchandise; that accounts were so kept that a manager could not default without being discovered; that auditors came from time to time to audit the books and statements would be furnished to the local people; that the League was educational; that its purpose was to help organize other groups; that when a sufficient number of local associations were established in southern California, they could vote 25 per cent of their capital and organize a wholesale at Los Angeles for their benefit; that the League was an incorporated body and was authorized by law to act as trustees of the funds and managers of the local stores in the same manner as a

bank or trust company; that the League furnished trained managers; that they would send a bonded organizer to receive the Loan Capital and place it in escrow in a bank until the San Diego people were ready to buy a store; that they would send an expert to assist in purchasing a store in a proper location.

Counsel for appellant contends that the purpose of the Pacific Co-Operative League was not to act as agents or trustees but to own and operate stores and that there is no evidence to the contrary. (Testimony of Charles Henry Peltcher, Tr. pp. 64-66; testimony of John A. Hadland, Tr. pp. 66-68; testimony of Charles J. Eason, Tr. pp. 71-74; testimony of W. S. Neal, Tr. pp. 87-88; testimony of Stanley M. Gue, Tr. pp. 88-91; testimony of J. N. Bischoff, Tr. p. 113; testimony of Walter Barnes, Tr. pp. 118, 119, 120; testimony of John S. Seibert, Tr. pp. 122, 124.)

Purchase of Stores

The San Diego Association appointed a committee to investigate the purchase of a store or stores, and authorized said persons to purchase for the local Association. An agreement was entered into between the San Diego Association and the Consumers Grocery Company to purchase three grocery stores. It was signed by the President and Treasurer of the local Association as such. There was no approval by the Pacific Co-Operative League as the instrument itself shows on its face. This matter was suggested and

the statement made by the persons present that it should be approved because the local Association wanted the expert advice of the League to which they were entitled. The San Diego Association authorized the purchase, ordered a draft drawn for \$1,000.00 on the League and requested that the League send an expert to open the stores and protect the interests of the San Diego people. (Tr. pp. 73-77; testimony of Charles J. Eason, Tr. pp. 77, 80; minutes of Directors meeting San Diego Association August 9, 1920, Tr. pp. 78, 79; testimony of Charles J. Eason, Tr. p. 145.)

The San Diego Association paid for the stores with money subscribed by San Diego people and a loan made by the San Diego Association from a man named Templeton Johnson. The Pacific Co-Operative League did not contribute one cent toward the purchase of the stores. After the stores were fully paid for, the San Diego Association still had a balance of \$1,252.98 to its credit. (Stipulation of Facts, Tr. p. 147.)

Notwithstanding the fact that counsel for the appellant contend that the Pacific Co-Operative League purchased the stores, they have stipulated to the above.

Creditors

Considerable stress is laid upon this point by opposing counsel. They state that creditors of the Pacific Co-Operative League extended credit on the faith that the League owned the stores in San Diego. They have introduced absolutely no evidence to substantiate this contention.

We do not know who the creditors of the Pacific Co-Operative League are. None of these creditors were produced at the hearing of this matter to testify as to facts leading them to extend credit to the Pacific Co-Operative League.

The stores in San Diego purchased almost all of their stock from the San Diego wholesalers. A small amount was bought in Los Angeles. (Testimony of Walter Huggins, Tr. p. 94.)

The creditors of the San Diego stores extended credit to them on the faith that the stores were owned by the San Diego people. At the time of the hearing of this matter, none of them had filed claims against the estate of the Pacific Co-Operative League or League Stores, Inc. (Testimony of Walter G. Gastil, Tr. p. 97; testimony of Walter Huggins, Tr. p. 97.)

The sign on the largest store stating that it is owned by 500 families is visible to persons and firms doing business with the San Diego stores.

There is no evidence that the Pacific Co-Operative League even contracted any liabilities for the benefit of the San Diego Association.

The League sent a circular letter addressed, "To the firms with whom we are doing business", which stated that the Pacific Co-Operative League had no capital stock and that its entire capital consisted of monies raised by membership payments. (Petitioners' Exhibit No. 21, Tr. p. 102.)

The Pacific Co-Operative League was incorporated under the laws of the State of California. Its purpose is clearly stated in the By-Laws (Tr. p. 70.)

Its plan of operation was also explained in many issues of the Pacific Co-Operator, the official organ of the League. (Tr. p. 98, 99.)

The books of the Pacific Co-Operative League were open to the inspection of creditors. We do not believe that any creditors of the League extended credit on the faith that the League owned the San Diego stores.

The evidence shows that creditors of the San Diego stores extended credit on the faith that they were owned by San Diego people and that the Pacific Co-Operatives League acted as trustee.

The Pacific Co-Operative League changed their form of organization to a profit corporation and made a great effort to trade its stock for "Loan Capital Certificate." In an endeavor to obtain the ownership of the stores in San Diego and elsewhere. When this effort failed, the creditors of the League very promptly filed an involuntary petition in bankruptcy against it, because the creditors knew that unless the League could obtain the ownership of the stores, it was bankrupt.

Loan Capital

The "Loan Capital Certificates" stated that the

money was for the use of the San Diego stores, and was to be used in accordance with the By-Laws of the Pacific Co-Operative League.

The By-Laws state that the purpose of the League is to promote co-operation, aid local groups such as the San Diego Co-Operative Association, and to act as agents or trustees by keeping the books, furnishing managers, expert advice, et cetera.

They further go into detail as to how a local group may affiliate and provide for a return of the loan capital upon dissolution of the stores. We believe that the By-Laws alone would prove that the Pacific Co-Operative League did not own the San Diego stores. (Tr. pp. 70, 102.)

Counsel for appellant contend that all transactions between the Pacific Co-Operative League and the San Diego people were between the League and individuals. We have answered this in the opening part of our argument but wish to call special attention of this court to the fact that the By-Laws of the League constantly refer to groups and not individuals.

Interest on Loan Capital and Dividends

Interest was paid on the loan capital only out of the earnings of the local stores in San Diego. Interest was never paid by the Pacific Co-Operative League, and the local stores never paid interest on the capital of any other local groups.

Dividends or rebates as they were called were paid only from the earnings of the San Diego stores. The payment of rebates and interest were determined by the local Board of Directors. The San Diego stores never shared in the profits of the Pacific Co-Operative League or any other local groups, neither did they pay any of the debts of the Pacific Co-Operative League or any other group. If the Pacific Co-Operative League borrowed the money for the stores, it should have paid the interest. (Testimony of Charles Henry Pelcher, Tr. p. 65; minutes of members' meeting of San Diego Association, February 17, 1921, Tr. pp. 80, 81; Tr. pp. 82-84; testimony of Stanley M. Gue, Tr. pp. 90, 91; testimony of Chas. J. Mays, Tr. pp. 92, 93; testimony of A. A. Johnson, Tr. pp. 108, 110; John S. Seibert, Tr. pp. 124, 125; testimony of H. H. Dobbs, Tr. pp. 141, 142.

Operation of Stores—Management

We admit that the manager of the San Diego stores was furnished by the Pacific Co-Operative League, that he was bonded to the League, that the books were kept, that the receipts sent to, and the bills paid by the Pacific Co-Operative League out of the receipts of the San Diego stores for the benefit of the local Association in San Diego. As trustee of the local Association in San Diego, all of these things were proper and as represented by the By-Laws, literature, and personal representations. They do not, in any manner, prove that the ownership is in the League.

Deposit of Monies

The fact that the monies were deposited to the credit of the Pacific Co-Operative League and checks on drafts paid by the League does not prove ownership. Banks, attorneys, trust companies, title companies and others accepting trusts are accepting monies of clients depositing them to their own account and disbursing funds by checks of the company or individual. Under the representations of the League, the funds were held in trust. (Petitioners' Exhibit No. 14, Tr. p. 98; Petitioners' Exhibit No. 12, Pacific Co-Operator, July, 1920, Tr. p. 99; testimony of Stanley M. Gue, Tr. p. 89).

Taxes, Insurance, Legal Title

As trustees for the San Diego Co-Operative Association it was the duty of the Pacific Co-Operative League to take proper care of these matters. The members of the San Diego Association had confidence in the Pacific Co-Operative League or they would not have employed them as their trustees. Until the hearing of this matter, they had no knowledge of the facts that the stores were insured in the name of the Pacific Co-Operative League, that the taxes were paid in a like manner or that the notice of sale, and bill of sale were in the name of the Pacific Co-Operative League. The Pacific Co-Operative League violated its trust. Judge Bledsoe in his opinion, stated that, "Equity looks

to the substance not merely to the form.” (Testimony of H. A. Floaten, Tr. p. 135.)

Trusts

Section 2222, Civil Code. How created as to trustee. Subject to the provisions of Sec. 852 a voluntary trust is created as to the trustee, by any words or acts of his indicating with reasonable certainty:

I. His acceptance of the trust or his acknowledgment, made upon sufficient consideration of its existence, and

II. The subject, purpose, and beneficiary of the trust.

Constituted by any acts or words of his indicating with reasonable certainty. acceptance of trust or acknowledgment upon sufficient consideration of its existence, purpose and beneficiary.

Barker vs. Hurley, 132 Cal. 21.

If a person has accepted the office either expressly or by implication, it is conclusive and he cannot afterwards by disclaimer or renunciation avoid its duties and responsibilities and the reason is that if the estate has once vested in the trustee it cannot be divested by a mere disclaimer or renunciation or can he convey the estate against the consent of the cestui que trust without committing a breach of trust, unless the instrument creating the trust gives him that power or unless there is a decree of a court to that effect.

Drane v. Gunter, 19 L. L. A. 331;
Strong v. Willis, 3 F. L. A. 124;
Booth v. Oakland Bank of Savings, 122 Cal.
19, 24.

Words upon trust or trustee not necessary if creation of trust is otherwise sufficiently evident. Code relates to trust of personal property.

Barker v. Hurley, 132 Cal. 21, 28.

Trusts in personal estate are subject to no statutory restrictions and legislature has never attempted to define and enumerate the lawful creation of such trusts.

In re Estate Hinckley, 58 Cal. 457.

Written instrument not necessary to creation of trust in personal property.

Helman v. McWilliams, 70 Cal. 449, 452;
In re Estate Walkerley, 108 Cal. 627;
Booth v. Oakland Bk. of Savings, 122 Cal.
19, 24.

Trust concerning personal property may be proved by parole.

Silbey v. Hodgdon, 52 Cal. 363, 367.

Whereupon a purchase of property, the conveyance of the legal title is taken in the name of one person or the consideration, or part of it, given or paid by another not in the way of a loan, to the grantee, the parties being strangers to each other, a resulting trust immediately arises from the transaction and the person named in the conveyance will be a trustee for the party from whom the consideration proceeds. Vol. 1, Sec.

126, p. 185 of Perry on Trusts and Trustees, 6th Edition.

Resulting trusts: The plaintiffs furnished the defendant with money to purchase an interest in a mining corporation, with a verbal agreement that he should take a conveyance in his own name and transfer the same to the plaintiffs after a meeting of the company when demanded. Held that the conveyance to the defendant created an implied trust to the plaintiff's use arising by operation of law and as such not necessary to be created by writing under the Statute of Fraud.

Bayles v. Baxter, 22 Cal. 575.

Conveyance to a third party with or without consent of such vendees, without new or further consideration, creates a resulting trust in favor of vendee.

Davis v. Baugh, 59 Cal. 568.

Resulting trusts are fully recognized by the law and everyone is presumed to know the law.

Murphy vs. Clayton, 113 Cal. 153.

Where one person has acquired the legal title to property to which another has a better title and to whom it ought in equity and good conscience to go, equity will convert him into a trustee for such other person.

Crosby v. Clark, 132 Cal. 1.

Where one party has acquired the legal title to property to which another has the better right a court

of Equity will convert him into a trustee of the true owner and compel him to convey the legal title.

Meader v. Norton, 78 U. S. ((11 Wall.) 442.
20 L. Ed. 184.

A court of Equity where it finds property in the hands of a person which is held in whole or part for the benefit of another, will under all proper circumstances impose upon the relation so existing, the character of a trust and declare interests of the several parties as they may appear.

Butterfield v. Harris, 20 Cal. Appl. 471.

Resulting trusts are not within the Statute of Frauds and may be proved by parole.

Osborne v. Endicott, 6 Cal. 149;
Millard v. Hathaway, 27 Cal. 119;
Roberts v. Ware, 40 Cal. 634-637;
Tripp v. Duane, 74 Cal. 85;
Thomas v. Jameson, 77 Cal. 91-93.

Considerable stress was laid on several points by the respondents' attorney in his argument before the Master. These points were: identification of trust fund; mingling of funds; identity of store and business; and change of materials or merchandise in such store. The following case deals with these points very thoroughly;

Walter W. Byrne, et al, appellants, v. B. Mc-Grath, respondent, 130 Cal. 316.

The subject matter of this trust is a drug store:
(Page 320, second paragraph):

"The question of identity does not relate to the specific items of stock, fixtures, etc., con-

stituting the drug store at the time of the purchase but to the drug itself which is to be regarded collectively as a thing or entity, or, as it would be called in the civil law, a *universitas rerum* (Mackeldy's Roman Law, Secs. 159, 162) The material things belonging to the concern did not constitute the collective things or *universitas* spoken of as a drug store or business, but were only mutable and transitory parts of it. It was this that constituted the trust fund in question, which was something different from the material things momentarily constituting it and remained the same, through these, like the particles of water in a river were continually changing. At the time of the sale thereof it was (still) the identical property originally covered by the trust (*Orcutt v. Gould*, 117 Cal. 316)

* * * The identity of a trust fund consisting of money (it is said in the case stated), may be preserved so long as it may be followed and distinguished from all other funds, not by identifying the individual pieces or coins, but by showing a separate and independent fund or value readily distinguishable from all other funds' and a fortiori is this true when the fund consists not of money, but of tangible and distinguishable items of property."

Estoppel

We do not believe that the evidence shows that the stores were owned and controlled by the Pacific Co-Operative League from Sept. 11, 1920 until January, 1922, or at any other time. There is no evidence that the creditors of the Pacific Co-Operative League extended credit on the faith of the League's ownership of the San Diego stores. On the contrary there is evidence that credit was extended on the faith that the stores were owned by the San Diego people.

"My name is Walter G. Gastil. I am a wholesale grocery salesman employed by the Southwestern Grocery Company. I called on Mr. Huggins under the direction of our Credit Manager, and asked him where and by whom the bills would be paid and how often. Mr. Huggins stated the bills would be paid in San Diego; that they had a bank account down here, and that he would pay the bills each week. Mr. Huggins told me that the only connection between the local stores and Pacific Co-Operative League was for buying purposes." (Testimony of Walter G. Gastil, Tr. p. 97.)

"I do not know if any creditors of the local stores have filed claims in the Bankruptcy Court; several told me they had not, none told me that they had." (Testimony of Walter Huggins, Tr. pp. 96, 97.)

Other testimony on this subject is referred to under the heading "Creditors" in the argument.

There is no evidence that the local Board of Directors or the local Association had any knowledge that the Pacific Co-Operative League had violated its trust until December 1921, when the San Diego Association discharged the Pacific Co-Operative League as its trustee, appointed the directors of the San Diego Association to act as trustees in its stead and commenced an action in the Superior Court of San Diego County, California, asking for a dissolution of the trust and an accounting. (Minutes of meeting of San Diego Association December 15, 1921, Tr. p. 91.)

All of these things were done prior to the adjudication of the Pacific Co-Operative League or the Pacific Co-Operative Stores as bankrupt.

Counsel for appellant contend that by reason of the decree of the District Court the San Diego Association will take the stores free and clear of any claims whatsoever and that the creditors will be defrauded. That is not a fact, the San Diego stores owed about \$5,000.00 for merchandise purchased by said stores at the time this action was commenced. These creditors extended credit on the faith that the Pacific Co-Operative League did not own the stores but that the stores are owned by the San Diego people. If the stores are returned in accordance with the decree of the District Court these creditors will look to the stores for the amount due to them. They can immediately attach the stores which have a value in excess of the amount due them.

We contend that if the doctrine of Estoppel is ap-

plied in this matter, it should be applied against the Pacific Co-Operative League or its present successor the Trustee in Bankruptcy.

The evidence shows that the Pacific Co-Operative League represented that its purpose was to act as managers or trustees for local groups. These representations were made by the President of the League and other representatives at public meetings and through personal contact; they were made through various issues of the Pacific Co-Operator, the official organ of the League, its By-Laws and other literature. Representatives of the League placed a sign on the main store in San Diego stating that the store is owned by 500 families. This sign was over the store for a period of more than one year. The manager of the San Diego stores employed by the League represented to creditors of the stores that the only connection between the stores and the Pacific Co-Operative League was for buying purposes. Credit was extended on the faith that the San Diego stores were owned by the San Diego people. The Pacific Co-Operative League knew that the San Diego Association held regular meetings, that the store manager reported at these meetings, that the local Association in good faith believed that the stores were owned by its members. They addressed correspondence to the local Association, requested permission of it to pay certain expenses incurred by Mr. Ames in the interest of co-operation, referred such matters as the return of Loan Capital back to the local Association for action, allowed the local Association

to negotiate for the purchase of stores, to sign a written agreement for that purpose and to function as owners of the stores. We believe that under the circumstances it cannot be said that the Pacific Co-Operative League or its successors can now come into equity with clean hands. If it were decided that the stores in question are a part of the assets of the Pacific Co-Operative League, the creditors who extended credit to these stores would get only a very small portion of what is justly due to them. We believe that they and not the Trustee has a lien upon the stores, and that the doctrine of estoppel applies against rather than in favor of the Trustee in Bankruptcy.

Opinion of Judge Bean

We do not believe it fair or just to cite this opinion unless this court is furnished with a transcript of the evidence showing the facts presented before the Special Master by both parties.

Judge Bean states in his opinion, "Now the principle contention of the defendants is, first, that the La Grande stores belonged to them, individually, and not to the Co-Operative League; but that is not supported by the testimony at all." The local people in the La Grande matter were the defendants.

The question is, what testimony was introduced by the La Grande people? Unless this court can review that testimony we contend that it is unfair to use the opinion against us in this hearing.

Agency

Counsel for appellant contend that if an agent or trustee contracts personal debts, not for the benefit of the cestui que trust or the subject of the trust or outside of its duties and powers as trustee, the cestui que trust is liable for those debts of the trustee.

For example, a corporation engaged in the realty business represents various clients as trustee, managing stores, apartment houses or other enterprises. In the operation of its business, credit is extended to the corporation. Counsel for appellant contends that the property belonging to the clients of the real estate firm, trust funds in the bank et cetera are liable for the debts of the corporation if the clients have knowledge of the fact that the corporation is contracting debts. If that is the law or is equity every employer is liable for the personal debts of his agents, and all persons or firms doing business with banks, trust companies, real estate brokers and many other lines of business are liable for their debts.

Counsel for appellant also contends that because the funds of the San Diego stores were placed in the bank account of the Pacific Co-Operative League and commingled with the funds of the League and other groups, that they became the property of the League, that because bills of the local stores were paid by checks of the Pacific Co-Operative League, the League owned the stores.

Memorandum Opinion of Judge Bledsoe

“Bledsoe, District Judge: With respect to the report of the Special Master in the above entitled matter having to do with the application of the San Diego Co-Operative Association for the delivery to it by the Receiver herein of three certain grocery stores situated in San Diego and the exceptions of the Receiver to such report, I have given the matter and the points presented in the comprehensive briefs of counsel, careful consideration. I can see no reason why the report of the Special Master should not be approved and confirmed.

It is true, of course, as claimed by the Receiver that the bankrupt was vested with and was actually engaged in the management of the three stores in question. It is equally true, however, and more to the point, that the members of the San Diego Co-Operative Association themselves put up the money which was actually used to purchase these three stores and I have no doubt but that they at all times in good faith felt that they were the owners and operators of the stores. Their Board of Directors sat in judgment on many of the problems presented and when not so concerned they were taking advantage of the supposedly expert advice and experience in co-operative work furnished them by the Pacific Co-Operative League. Because of their respective subscriptions and payments of real money to the Pacific Co-Operative League,

they acquired no interest or participation in any of the real or supposed general assets of the League. All of their interest, dividends and profits and all their participation in any subsequent "dissolution" was limited to the activities and property of the specific stores purchased with their money. The San Diego members of the League were interested in no stores other than their own; other members were not interested in their stores.

It is apparent from the constitution and by-laws of the League itself, that with respect to "associate members" such as the San Diego members were, they were to contribute distinct funds to be handled by the League but that such funds were for the purpose of organizing distinct League branches "that they may operate stores or enterprises." Such language would not have been used had it been intended that the stores or branches were to be the property of the League itself. So, also, the constitution provided that in order that the operation of such branch stores might be had, the Board of Directors of the League should order a survey of any proposed district to be made and decide the number of members and the capital required to operate such branch. The capital for such purpose was to be provided by a payment of each applicant for his associate membership in the League itself, which sum was not to be returned to him, to the amount of ten dollars and such additional amount as with the other payments from similar memberships in that locality

would provide the capital necessary to establish the branch in business.

It is provided and it was the actual experience of the San Diego Association that the interest at five per cent upon the so-called loan certificates, was paid out of the profits of the local stores at San Diego and the profits in addition upon purchases made therein by the holders of the loan certificates, were also paid out of profits of such stores.

When all else is said, it remains the fact that these stores were bought with money actually furnished by the members of the San Diego Co-Operative Association and it would require some definite and positive agreement, to which they were knowingly party, to hold that under such circumstances someone else was to become the owner and possessor of the properties purchased by them and with their money. The contract for the purchase of the three stores was made by them. It was never approved and accepted by the League, or at least a part of it never was approved, and in any event, it is apparent that the members of the Association themselves picked out the stores wanted, negotiated respecting the prices thereof, and they were responsible for the purchase thereof. The League merely held their money and offered them advice from time to time and provided them a Manager who was paid out of profits arising from the operation of their own stores, all in accordance with its declared purpose. That the actual bill of sale was made out to the League as

vendee and that other papers, indicative of ownership in it were executed without the actual knowledge of the members of the San Diego Association, does not change the legal situation. Equity looks to the substance not merely to the form.

I cannot accede to the view seemingly by Judge Bean of the District of Oregon, that as the League managed the stores therefore the League must have been and was the owner of the stores. If that were true, it would be a dangerous expedient for any purchaser or owner or possessor of property to employ someone to manage same for him.

If it be a fact that some members of the San Diego Co-Operative Association have parted with their so-called loan certificates and in return therefor have received stock or other certificates, that fact can have no influence here. The Association is entitled to these three stores. As to whom may be members of the Association and entitled to participate in the profits from or fund arising out of a dissolution of the stores, is another matter. If members of the Association shall have surrendered their loan certificates and in that wise, in equity or otherwise, surrendered or divested themselves of their interest or membership in the Association, then they have no right to participate in any profits accruing to the Association or to a division of any property belonging to the Association; and by the same token, if the Pacific Co-Operative League Stores is now possessed of such loan certificates, the Receiver

thereof will be entitled to make such use of them and enjoy such rights accruing from them as the individual owners thereof would had they remained in possession of them. Surrender of certificates by some would not change the legal rights inuring to the others.

Thirty exceptions were filed by the Receiver to the report of the Special Master. All of these exceptions are over-ruled and pursuant to Federal Equity Rule 67, there is hereby taxed as against the Receiver, the sum of five dollars for each of such exceptions so taken and over-ruled.

The report of the Special Master is confirmed and an appropriate order, directing the delivery of the property, as prayed for, will be entered. Counsel for the Association will prepare such order.” Tr. pp. 148-153).

It is, therefore respectfully submitted that the decision of the Special Master and the District Court should be affirmed.

Respectfully submitted,

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